IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-9051

HAZEL M. TALBERT

Petitioner,

vs

UNITED STATES OF AMERICA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Respondent.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above-entitled case on October 11, 1973.

CITATIONS TO THE OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is unreported. The opinion of the Fourth Circuit Court of Appeals is quoted verbatim as follows:

PER CURIAM:

Upon consideration of the briefs and oral argument, we find no reversible error.

AFFIRMED

JURISDICTION

The original judgment of the Circuit Court of Appeals was entered on September 28, 1973, a Motion for Rehearing filed by the petitioner on October 11, 1973, was denied November 14, 1973.

The Jurisdiction of this Court is invoked under 28 U.S.C. §1245 (1).

QUESTIONS PRESENTED FOR REVIEW

1. Was the defendant denied equal protection of the law by being denied the use of information cards on prospective jurors, compiled by the government.

2. Did the trial court err in refusing to inquire of the jury panel certain written questions requested by the defendant?

3. Did the trial court err in refusing to sequester the witnesses, upon request by defendant's counsel?

4. Did the trial court err in refusing to grant defendant a mistrial when the government *nol prossed* one of two indictments after the close of the evidence and after the jury had been given the full cumulative effect of two charges against the defendant?

5. Did the trial court err in denying defendant the opening and concluding argument?

6. Did the trial court commit prejudicial error in its charge to the Jury?

7. Can a defendant be convicted of a crime of "aiding and abetting" when there is no evidence of participation by the defendant in the illegal acts?

8. Was the defendant denied the rights afforded him by the Fifth and Eighth Amendments to the Constitution of the United States in the sentencing procedure used by the trial court?

STATUTES INVOLVED

". . . Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature . . . shall be fined not more than $10,000.00, or imprisoned not more than ten years, or both."

18 U.S.C. 2314

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal . . . "

18 U.S.C. 2

CONSTITUTIONAL PROVISIONS RELIED UPON

"No person should be . . . deprived of life, liberty . . . without due process of laws . . ."

Amendment Five to the
Constitution of the
United States

"Excessive bail shall not be required and excess fines imposed, nor cruel and unusual punishment inflicted."

Amendment Eight to the
Constitution of the
United States

STATEMENT OF FACTS

The defendant, MICKEY TALBERT, was tried and convicted in Columbia, South Carolina, on a charge of

aiding and abetting the forging and cashing stolen travelers' checks. The indictment charged five separate transactions between July 7 and July 9, 1970, in which a stolen $10.00 traveler's check was negotiated (for a total amount involved of $50.00). Charles Otis (Duke) Durden and Weldon Odel Jett were also indicted with Mickey Talbert, but they pleaded guilty before Mickey's trial. Lauren Harding Nauss was also named in these indictments, but these charges were not processed against him when he pleaded guilty to a separate charge of stealing these checks from a bank. Neither Mickey, nor Durden nor Jett was ever charged with stealing these checks.

The evidence adduced at the trial showed that in the fall of 1969, Nauss had entered the University of South Carolina as a freshman (T-57) and had joined the Sigma Chi Fraternity. Jett was already enrolled in the University and was a member of Kappa Sigma Fraternity (T-128). Mickey Talbert was never enrolled in college but was working for the Clairol Company as a traveling representative during this time. Mickey Talbert, Jett, and another student, named Guerry Sample, shared an apartment off campus for approximately four or five months (T-129).

Neither Nauss, Jett, Durden nor Mickey Talbert were close friends, although Jett, Durden and Nauss did know each other. Mickey Talbert was engaged to be married during this period of time, and he was spending every evening with his fiancee. Mickey had barely met Nauss and Durden, and Mickey did not know Jett much better because his job kept him away some of the time and because he spent all of his free time with his fiancee (T-229-237). There also was not that much

community of interest since Jett, Durden, and Nauss were in college and Mickey was not.

Shortly after Nauss entered school in the fall of 1969, he got a part-time job with the Banker's Trust Company in Columbia (T-57-58). Shortly after Nauss started to work for the Banker's Trust Company, he made a plan to utilize some keys to the Bank he had obtained from a former employee of the Bank and enter it at night in order to steal from the Bank. One night in December of 1969, Nauss did enter the Bank and did steal a quantity of travelers checks. No other person was charged with Nauss as being involved in the theft of the checks.

Nauss testified that in December (before the school's Christmas holidays) he took the checks over to the apartment shared by Jett and Mickey and left them with Mickey. (T-64-67).

The Government's case against Mickey Talbert was not for any connection with the stealing of the checks, it was for cashing them. The Government's case as to this aspect was built around the testimony of the co-defendant, Jett.

The only testimony of any witness connecting Mickey to the cashing of these checks was that of his co-defendant, Jett. Jett testified that he received some of these stolen travelers checks from Mickey towards the last part of December, 1969, or the very first part of January, 1970. Jett further testified that he paid Mickey some amount of money for these checks at the time he got them. This was the sum total of the evidence against Mickey.[1] (T-134).

[1] Mickey denied these allegations of Jett. Mickey testified that the checks had been left for Jett, and that he never sold

Jett then shared these checks with Duke Durden, and Jett and Durden took several trips together in the next few months, each of them cashing these checks on these trips. (T-152-154). After a while, Jett began to become afraid of the consequences of his acts and determined not to cash any more of these checks. He gave some of them away to a friend, Bucky Dudley, who actually cashed the checks in July which form the basis of this indictment against Mickey. (Bucky Dudley was never indicted by the Government for his involvement in this affair). Jett's testimony was that in giving these checks away to Bucky Dudley, it was his intention to disassociate himself completely from any further participation in this matter.

Mickey Talbert was indicted on two indictments (72-298 and 72-300). The indictment (72-298) named Nauss, Jett, Mickey and Durden as co-defendants, and listed seven of these same $10.00 checks which were cashed in February of 1970. Durden pleaded guilty to one count of this indictment, and the remaining counts were *nol prossed*. The Government *nol prossed* the indictments as to Nauss and Jett.

Originally Mickey's trial involved both indictments, but after the conclusion of the Government's evidence, the indictment dealing with the checks cashed in February of 1970 (72-298) was *nol prossed* as to Mickey leaving only the indictment dealing with the checks

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any of these to Jett. Mickey testified that the checks were in the apartment and Jett could have taken any quantity of them he wanted to any time. We recognize that these conflicts in testimony cannot be resolved on appeal, and this appeal does not rely on or utilize in any way this (or any other) conflict(s) in the testimony.

cashed in July of 1970 (72-300). Mickey was found guilty only as to the July indictment.

No indictments were returned for the other checks cashed by Jett and Durden during the several months of their active operations in passing them.

The trying of both indictments together and various rulings of the Court in this regard will be cited as error later in this brief.

Apparently, Bucky Dudley operated completely on his own in cashing these checks. There is no evidence that anyone was present with Dudley at the time he cashed them nor is there any evidence that anyone participated in any way whatsoever in the act of cashing them. The evidence is also silent as to when they were given to Dudley, but it seems that Jett gave them to Dudley at least weeks, and possibly months, before they were cashed.

Another witness of some importance was a co-defendant, Duke Durden. Indictment 72-300 (the one under appeal here) named Nauss, Jett and Mickey as jointly cashing these checks in July of 1970 (the person who actually cashed them, Dudley, was never indicted). Another indictment, 72-798, named Nauss, Jett, Mickey and Durden as cashing seven of these checks in February of 1970. The Government dropped the charges against Nauss and Jett in this second indictment prior to trial. Durden pleaded guilty prior to trial, so Mickey was tried alone on both indictments. At the close of the Government's evidence, the charges against Mickey were also dropped as to indictment 72-298 dealing with the "February checks."

Thus, at the outset of the trial Durden was a co-defendant with Mickey although he (Durden) had

pleaded guilty. Later, Durden was not a co-defendant when the only indictment in which he was still named (72-298) was *nol prossed* as to Mickey.

When Durden was not called during the presentation of the Government's case, the defense, relying on a written statement he had made to the FBI (and which had been furnished by the District Attorney) called him on behalf of Mickey Talbert.

Durden had told the FBI that he had not gotten these checks from Mickey, did not know Mickey, had not paid Mickey anything, and did not know Mickey was in any way involved. He reaffirmed this to defense counsel when interviewed during one of the pre-trial appearances (T-280-295). Durden again testified that he got the checks from Jett; that he had met Nauss through Jett; that he did not at any time know of any fact which would connect Mickey Talbert to these checks (T-280-283).

However, Durden had told the FBI that Jett had given him (Durden) the checks and had not asked for nor expected Durden to pay for them (T-301-303). However, after sitting in the courtroom and listening to Jett testify that Jett and he had an arrangement whereby they would split the proceeds from the cashing of these checks (T-146, 149), Durden changed his testimony.

It was part of the defense case that Jett would not (as he testified) pay Mickey Talbert for these checks and then give them to Durden. By changing his story to say that Jett had not given the checks to him but had sold them to him, Durden not only surprised the defense, but made a material and substantial change in the posture of the evidence in this case.

At the beginning of the trial the defense had asked that all of the witnesses be sequestered, but this request was denied by the trial judge. This failure of the trial court to sequester the witnesses and the subsequent material change in a witness's testimony is cited as one of the errors Mickey Talbert relies on in this brief.

Mickey was married to his fiancee in February of 1970, and thereafter had no contact whatsoever with Jett or any of the others. Mickey had moved to Atlanta when the checks were cashed in July of 1970. The Government's contentions are that by selling these checks (in blank) in December of 1969, to Jett that Mickey became an aidor and abettor when they were subsequently filled in and cashed by Bucky Dudley in July of 1970. We disagree that under any construction of the evidence could Mickey be guilty of aiding and abetting this crime in July of 1970.

There is another aspect to this statement of facts. Every point raised in this application for certiorari was raised in the appeal to the Fourth Circuit Court of Appeals. The only opinion entered by that Court is as follows:

PER CURIAM:

Upon consideration of the briefs and oral argument, we find no reversible error.

AFFIRMED

We respectfully submit that the Fourth Circuit Court of Appeals improperly considered Mickey's appeal and failed to enter an appropriate opinion considering and dealing with the points raised in that Court.

ARGUMENTS AND CITATIONS OF AUTHORITY

I. THE DISTRICT ATTORNEY'S OFFICE USED JURY INFORMATION CARDS IN SELECTING A JURY WHICH WERE NOT MADE AVAILABLE TO THE DEFENSE COUNSEL.

The District Attorney's office compiled and used informational cards on the prospective jurors in the jury selection. These cards contained information concerning previous jury service of that juror and, (presumably) whether or not that juror had been struck previously by a party. The defendant, on his motion, timely made before the jury was struck was not allowed to see these jury cards.

Continuing information regarding jurors is such that it can only be kept by some governmental agency, because they are the only ones present for each criminal trial. It is not something that private attorneys can compile. Proof of the fact it is useful is made by showing that it is in fact used by the District Attorney and was denied to the defense.

We submit that this is information required to be available to defense counsel under the authority of these cases:

Brady v. Maryland,
373 U.S. 83

Giles v. Maryland,
386 U.S. 66

Williams v. Dutton,
400 F.2d 797

U.S. v. Elen,
335 F. Supp. 355

U.S. v. Houston,
339 F. Supp. 762

U.S. v. Collins,
339 F. Supp. 767

The cases cited above do not restrict themselves to a disclosure of evidence to be offered by the prosecution at the trial but encompass *all information* contained in the prosecutor's file which might prove beneficial to the accused unless the information is privileged. It might also be pointed out that the use of these jury informational cards is not an unusual practice throughout the country. They were not available to the defense through any other source.

The question to be resolved on this point is whether or not information regarding prospective jurors compiled by the prosecutor must be disclosed just as information concerning evidence or prospective witnesses must be disclosed.

We cannot perceive any reason to draw such a distinction. The rational of the cases cited above was that of a "full disclosure" policy, and it would seem that an accused ought to be allowed to have *all* of the information to be used at his trial. Use of governmental facilities to compile juror information which is used by the prosecution but denied to the accused would violate the same due process as was found to be violated in *Brady v. Maryland* and *Giles v. Maryland, supra.*

II. THE COURT ERRED IN FAILING TO INQUIRE OF THE JURY PANEL WRITTEN QUESTIONS PROPOUNDED BY THE DEFENDANT.

Prior to the selection of the jury, the defendant submitted written voir dire questions [2] to the Court (R-29-32). The trial court refused to ask most of these questions.[3] We submit that all of these questions were

[2] The questions are set out in Appendix A.
[3] The trial court conducted the voir dire examination.

pertinent and important to the defense and the case it planned to present in order to effectively and intelligently select a jury.

The District Judge characterized this as "trying the jury". We disagree.

The Fourth Circuit Court of Appeals has just recently said:

> "The denial or impairment of the right to challenge the jury has been described as 'reversible error without a showing of prejudice' ".
>
> *U.S. v. Gore and Liles,*
> 435 F.2d 1110 (4th Cir.)

See also:

> *Swain v. Alabama,*
> 380 U.S. 202-219

The Gore case specifically approved the holding in *Brown v. U.S.,* 338 F.2d 543, which contains this language:

> "Although the trial court possesses a broad discretion as to be asked on voir dire, the exercise of that discretion is subject to the essential demands of fairness . . . when important testimony is expected from certain categories of witnesses, whose official or semi-official status is such that a juror might reasonably be more, or less, inclined to credit their testimony, a query as to whether a juror would have such an inclination is not only appropriate but should be given if requested."
>
> *Brown v. U.S.,*
> 338 F.2d 543
> (Adopted by 4th Cir.)

The voir dire question asked in the *Brown* case dealt with whether or not a juror would be more likely to believe the testimony of a police officer. The Court of

Appeals suggested that the question be rephrased to determine whether or not a juror would give more or less weight to a police officer's testimony, and, in so doing, suggested that this is the way the court's discretion should be exercised—by rephrasing a question not denying the right to have the question asked.

> "The defendant had a right to have the question answered to afford him an opportunity to exercise his peremptory challenges intelligently. The question was submitted in writing to the court by defendant in advance of the voir dire examination and the information requested was reasonably necessary to enable the accused to exercise his peremptory challenges . . . though the court has broad discretion in conducting the voir dire examination, the question relating to the witness, Chamblee, was pertinent to the inquiry and it was error for the court not to ask it of prospective jurors." (reversed)
>
> ". . . the court had a broad discretion as to the questions to be asked. The exercise of this discretion, and the restriction upon inquiries at the request of counsel, were subject to the essential demands of fairness."
>
> ". . . But the Court interrupting counsel, disposed of the inquiry summarily. The Court failed to ask any question which could be deemed to cover the subject."
>
> *Cook v. U.S.*,
> 379 F.2d 966
> (5th Cir.)
>
> "No question of actual bias is before us . . . In both the Wood and Frazier cases (*U.S. v. Wood*, 299 U.S. 133, *Frazier v. U.S.*, 335 U.S. 511) this court stressed that while impaneling a jury the trial court has a serious duty to determine the

> question of actual bias, and a broad discretion in its rulings on challenges, therefor. We affirm those principles. In exercising its discretion, the trial court must be zealous to protect the rights of an accused . . . Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury.
>
> *Aldridge v. U.S.*,
> 283 U.S. 308-311

> ". . . the (peremptory) challenge is 'one of the most important of the rights secured to the accused . . .' The denial or impairment of the right is reversible error without a showing of prejudice . . . for it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom or it fails of its full purpose . . . Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause . . ."
>
> *Morford v. U.S.*,
> 339 U.S. 162-168, 171, 172

Just recently, this court reversed a South Carolina case for failure to inquire on voir dire concerning any possibility of racial bias.

> *Ham v. South Carolina*,
> 93 S.Ct. 848

The trial judge stated that since he instructed the jury which was finally selected what they could and could not consider then there could be no error (Transcript, Vol. II, pp. 3 and 4). This begs the question because the purpose of voir dire is to aid in the selection of a jury, not in instructing the jury. If the District Court is correct, then any jury can be instructed after it is selected whether as to racial prejudice or any other

matter and there could be no harm (or error). Again, the 7th Circuit has recently spoken on this point in *U.S. v. Dellinger*, 472 F.2d 340:

> "We recognize that there is no generally accepted formula for determining the appropriate breadth of and depth of voir dire, except that the court's discretion is subject to the essential demands of fairness." (p. 367)
>
> ". . . We do not believe that a prospective juror is so alert to his own prejudices. Thus, it is essential to explore the backgrounds and attitudes of the jurors to some extent in order to discover actual bias or cause." (p. 367)
>
> "If this right (of peremptory challenge) is not to be an empty one, the defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to intelligently exercise their peremptory challenges." (cite omit) (p. 368)
>
> "The insufficient voir dire of prospective jurors is the type of error which ordinarily would be found prejudicial in any event." (p. 385)

III. THE TRIAL COURT ERRED IN NOT SEQUESTERING THE WITNESSES UPON REQUEST.

After the jury was impaneled, the defendant requested that the witnesses be sequestered (T-53-56). In the presence of the jury, without any hearing, and without any instructions to the witnesses, the request for sequestration was denied. At the time it was denied, the trial court stated that it was for the purpose of "keeping the case moving" (T-54). However, at the time of the hearing on the motion for a new trial, the court stated that it had the additional purpose of allow-

ing a defendant (Durden) who had pleaded guilty to remain present because the evidence could possibly have had a bearing on his sentence. (T. Vol. II, 4-10, especially pp. 6 and 7).

> "The purpose of the rule of exclusion is to prevent the shaping of testimony by witnesses to match that given by other witnesses."
>
> *U.S. v. Cozzetti,*
> 441 F.2d 344

By one of those rare coincidences, the Fourth Circuit Court of Appeals has considered this exact situation in another case which was tried by the same district judge. In that case, the court seemingly disapproved of the non-sequestration of co-defendants who had pleaded guilty, but affirmed on the ground that there was absolutely no showing that any actual prejudice had occurred to the defendant on trial.

> "The sequestration of witnesses, long practiced in English and United States courts, rests within the sound discretion of the trial judge (cite omit), and his ruling will not be reversed in the absence of manifest prejudice resulting from the presence of witnesses during the trial of his case (cite omit). The district judge, mindful that sequestration should not be lightly denied, heard extensive argument on the motion. The principal reason for initially denying sequestration was to allow defendants who had pleaded guilty to hear evidence that might bear upon their punishment. A separate hearing on the pleas of guilty, however, could have accomplished the same result. Upon review, therefore, we deem it more important that the record discloses no prejudice to the defendants on trial. The appellants have been unable to cite any instance of a witness being influenced by the testimony of another. Moreover, through cross-

examination, conducted with the benefit of pretrial statements furnished under the Jencks Act, failed to reveal shifts in testimony that could be attributed to the witness' presence in the courtroom."

U.S. v. Harris,
409 F.2d 77-81

In this instance, the Government's entire case revolved around the contention that Mickey had sold the checks to Jett who in turn gave them to Buckey Dudley, who in turn cashed them. Durden, who had pleaded guilty in indictment 72-298, had previously stated that Jett had given him the checks with "no strings attached" (T-303). Thus, a major part of the defense case was to show the inconsistency between these two witnesses. The defense contended that Jett would not be giving these checks away to Durden if he had paid for them. However, it would be consistent for Jett to give them away if he had not paid anything for them

However, Durden, who had been present in the courtroom throughout the trial and who heard Jett testify, changed his testimony to state that he bought the checks from Jett and that Jett and he shared the proceeds when he had previously stated that Jett had given them to him. This was a body blow to the defense.

It should also be noted that after the Government nol prossed indictment 72-298 (the one naming Mickey and Durden as co-defendants) there was absolutely no reason for Durden to have been in the courtroom at all. He merely became a witness at that point. In the next section of this argument, the defendant contends that he should have been granted a mistrial by the Government's introduction of evidence before the jury relating

to the charges contained in this indictment and then dismissing those charges.

In this instance harm also accrued to the defendant because the co-defendant, Durden, was allowed to remain in the courtroom under the pretext of being a co-defendant when in reality the Government intended to dismiss this indictment at the close of the Government's case.

IV. THE GOVERNMENT EITHER KNEW OR SHOULD HAVE KNOWN THAT IT WOULD NOL PROS INDICTMENT 72-298. A MISTRIAL SHOULD HAVE BEEN GRANTED, AS IT WAS HARMFUL TO THE DEFENDANT TO HAVE MATTERS INVOLVING OTHER CHECKS BROUGHT TO THE ATTENTION OF THE JURY.

Originally, Mickey Talbert was named in two indictments:

> 72-298—Named Mickey, Nauss, Jett and Durden as co-defendants for cashing seven $10.00 checks in February of 1969. These charges were dropped as to Nauss and Jett. Durden pleaded guilty to one count.
>
> 72-300—Named Mickey, Nauss and Jett as co-defendants for cashing five checks in July of 1971. The charges were dropped as to Nauss. Jett pleaded guilty to one count.

The trial initially contained both indictments, although Mickey had earlier made a motion to sever the trial and try each indictment separately. This motion was resisted by the United States Attorney and both cases were consolidated for trial with Mickey as the sole defendant in both cases.

The reason that Mickey asked that the cases be

separated was based partly on Durden's written statement to the effect that Jett had given him these checks to cash "with no strings attached" and Jett's statement that he did not know of any involvement Mickey had at all with any of the stolen travelers checks. The feeling on the part of the defense was that the sheer number of these transactions would have a cumulative prejudicial effect on the jury.

After the presentation of the Government's case, and without calling the co-defendant, Durden, the United States Attorney orally moved to nol pros indictment 72-298. This came as a complete surprise to the defendant whose attorney had cross-examined every witness in relation to this indictment as well as indictment 72-300. Thus, all of the possible prejudice was injected into the case by allowing the jury to hear the facts of the "February checks" and then to dismiss the indictment.

Also, we point out that after insisting on trying the two indictments together, when the Government found out that one of their witnesses, Durden, was going to change his testimony from that contained in the statement he gave to the FBI, they simply did not call him, nor did they proceed with that part of the case. Instead, the defendant was put in the position of having to call Durden as his own witness and then being surprised when Durden changed his story.[4]

This strategy of the Government smacks of a suppression of evidence which has been specifically ruled

[4] The defendant had to call Durden because up to the point where the Government rested both the Government and the defense were examining witnesses about the checks which Durden was involved with (the "February checks").

impermissible in the *Brady v. Maryland* and *Giles v. Maryland* cases, supra, which places the defendant in the position of being tricked.[5]

After this turn of events occurred, the defendant made a motion for mistrial (T-187, 188).

This motion was overruled (T-195-203).

We maintain that since the Government had made a deliberate and calculated decision to interject the "February checks" into the case and had fought so hard in resisting the motion to sever the trials of the two indictments, that some sort of burden passed to the Government to show:

(a) Why it had not nol prossed indictment 72-298 before the jury heard all of the evidence concerning these checks;

(b) Why it did not disclose to the defendant that Durden had changed his testimony from his previous statement to the FBI.

However, the Government made no showing whatsoever, and the trial court overruled the defendant's motion for mistrial.

V. IT WAS A DENIAL OF DUE PROCESS TO DENY THE DEFENDANT'S MOTION FOR THE OPENING AND CONCLUDING ARGUMENTS TO THE JURY.

To our knowledge, this point has not been raised before in a Constitutional sense. The argument is predicated upon this premise:

> The right to the opening and closing arguments to the jury is a valuable right.

[5] We do not mean to suggest unethical conduct on the part of the Government's attorney. Rather we simply point out that this strategy is not appropriate to a criminal proceeding.

We believe that no one would seriously debate this point. However, once this point is granted, it is difficult to argue that this right should be denied to a criminal defendant.

There are some cases which indicate that the opening and concluding arguments go to the party which has the burden of proof (*U.S. v. 2353.28 Acres of Land, et al*) 414 F.2d 965 (5th Cir. 1969). However, this reasoning applies to civil cases and not criminal cases.

We are in complete agreement with the practice of giving the right to open and conclude to the party with the burden of going forward with the evidence *in civil cases.* In a civil case, the right must be given to either the plaintiff or the defendant and the court is strictly neutral between these two positions. (The application of this practice allows some defendants as well as some plaintiffs the right to open and close in civil actions).

It seems only appropriate in a civil case to balance the disadvantage of carrying the burden of proof against the advantage of opening and closing, *but this is true not because the two matters are necessarily related, but because it tends to strike an equalization between all parts of the trial proceedings. This rationale is not appropriate to a criminal proceeding.*

The burden upon the Government is a constitutional burden, and it would seem to be patently unconstitutional to devise any system which would dilute or "equalize" the positions of the Government and the defendant. Any such "equalization" is actually nothing more than a dilution of the constitutional right of a criminal defendant to have the charges proven beyond a reasonable doubt.

The order of the argument of counsel is not related to the burden of proof doctrine, and most trial judges (properly) instruct the jury that they cannot consider argument of counsel as evidence. The two are not related, and hence any "reason" advanced for granting the Government the right to open and conclude based upon their constitutional burden to prove beyond a reasonable doubt is a rationalization, not a reason.

This defendant asked for this right in the trial court and it was refused. (App. 354-355). The trial court's reasons for denying this right were two-fold:

> (1) "*It is contrary to the rules.*" It is not contrary to the Rules of Criminal Procedure because it is not covered by those rules. Actually it would seem contrary to the "rules" to arbitrarily (without statutory or constitutional authority) deny an advantage to a criminal defendant. This is the only instance which comes to mind in the entire field of criminal law where an advantage is given to the Government, and it is especially surprising because of the lack of any specific authority or reasoning for such a practice.
>
> (2) "*It has been the practice since time immemorial.*" We respectfully submit that this is not an acceptable answer to a constitutional challenge. *Mapp, Gideon, Brady* and many other cases have recently shown that the constitutional rights of criminal defendants are not controlled by (even) long established practices.

Without authority other than "time immemorial" the practice of granting the prosecution the right to open and close is a denial of due process and is unconstitutional.

VI. THE COURT CHARGED THE JURY AS FOLLOWS:

"The other type of evidence we refer to as 'circum-

stantial evidence'. That is the proof of a chain of circumstances pointing to the commission of the offense or offenses charged in an indictment." (T-370, 371) (exception T-392, 393).

Without making a long or elaborate argument, we believe that it is fundamental that circumstantial evidence can point to innocence as well as guilt and it was error to limit the charge in this manner.

VII. THE TRIAL COURT CHARGED THE JURY AS FOLLOWS:

". . . The law says that where two or more persons associate themselves together in carrying out a common plan, lawful or unlawful, there arises from the very act of associating themselves together for such a purpose a kind of partnership in which each member becomes the agent of every other member. So in a case where the evidence shows a common plan or arrangement between two or more persons, evidence as to an act by one is admissible against all, provided the act be knowingly done and made during the continuance of the arrangement between them, and in furtherance of an object or purpose of the common plan."

". . . In order to establish proof that a defendant, or any other person was a party to or a member of some common plan or arrangement, the evidence must show that the plan was formed; and that the defendant or some other person who is claimed to have been a member knowingly participated in the plan with the intent to advance or further some object or purpose of the plan."

"If and when it appears from the evidence that a common plan did exist and that the defendant was one of the members, then the acts thereafter knowingly done by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to

> have been a member even though the acts may have occurred in the absence and without the knowledge of the defendant, provided such acst were knowingly done and made during the continuance of such common plan, and in furtherance of an object or purpose of the common plan." (T-373-4-5) (exception T-393).

This portion of the charge interjected the element of "conspiracy" into the case which was never present and it gave the jury latitude to convict for a conspiracy when such an element was not present.

VIII. MICKEY TALBERT WAS CHARGED WITH THE WRONG CRIME.

We have waited until the latter portion of this brief to argue what is termed in our jurisdiction the "general grounds", although they are usually argued in the first portion of a brief. We have waited hoping that the Court will get the "flavor" and "feel" of the facts of this case.

Whatever the facts are, we submit that they conclusively show that Mickey was not a principal participating in the cashing of these checks in July of 1970. By that time, Mickey had married and moved to Atlanta, the checks had been given by Jett to Bucky Dudley, and Mickey did not even know Dudley, did not know he had the checks, did not know he was to cash them, and did not participate in any way in their being cashed.

Perhaps the Court feels that Mickey was involved in some way in this occurrence—that he received stolen property or that he sold stolen property in December of 1969. Again realizing that the evidence must be construed most strongly against Mickey after conviction, we submit that these facts do not support a conclusion

that he cashed them in July, or that he aided and abetted in their being cashed in July.

The trial court summed this up in its charge to the jury:

> "Now this defendant is not charged with anything except the violation of this specific section of the statute which makes it unlawful, as I have pointed out to you, in reference to travelers checks to transport it or cause it to be transported in interstate commerce any falsely made, forged, altered or counter—I dropped down to the wrong section. Which makes it unlawful, as I've already told you, with fraudulent intent to transport in interstate commerce a travelers check bearing a forged signature. That is the only charge against this defendant in any of these counts in the indictment. He is not charged with any larceny from the bank of these checks. He is not charged with any knowingly receiving any stolen checks from the bank; nor is he charged with the actual alleged forgery of any of these checks. He is charged only and solely with this specific charge in each of those counts." (T-386)

It is admitted by the Government that Mickey did not participate in or have knowledge of the actual cashing of these checks in July. They charge him with "aiding and abetting." We submit that this is simply not a correct charge made in this indictment.

> "The concept of an accessory before the fact presupposes a pre-arrangement to do the act, and to constitute one an aider and abettor, he must not only be on the ground, and by his presence aid, encourage, or incite the principal to commit the crime, but he must share the criminal intent or purpose of the principal."
>
> *Robinson v. U.S.*,
> 262 F.2d 645

"Aiding and abetting' . . . means to assist perpetrator of crime."

White v. U.S.,
366 F.2d 474

"Appellant contends that under this section (18 U.S.C 2[9]) the accused must have knowledge of the criminal plan and must consciously share in the criminal act . . . we agree."

U.S. v. Smith,
418 F.2d 221

"Sine qua non of aiding and abetting is guilty participation by accused."

Bailey v. U.S.,
416 F.2d 1110

"We can find no evidence in the record that could properly permit the submission of the issue of guilt or innocence of the appellant, Torbert, to the jury in the absence of any testimony connecting her with the cashing of one or more of the forged checks. Her presence when Shelton delivered the blank checks, the typewriter and the identification cards to Hendricks, and her presence in the car on the trip from Mobile to Pascagoula, might well show knowledge by her that a criminal undertaking was afoot. But these facts do not show that she was a participant, either as a principal or as aider or abettor . . ."

"The essential element of transportation came from the transmission of the check through the usual trade and banking channels from Georgia, where the check was written and cashed, to Alabama where the drawee bank was located. Admittedly Parker did not write or prepare or draw, or handle the check. He did not, therefore forge the drawer's signature. What he did, and all that he did, viewed most favorable to the government's

case, was to (a) make the suggestion to his confederates that they should write another check on Manning, the purported drawer, (b) furnish the ballpoint with which it was written and (c) share substantially in the loot." (conviction reversed).

Hanna v. Plumer,
331 F.2d 157

This case holds that a person to be in violation of 18 U.S.C. 2314 must be a participant in the drawing and cashing of the check.

Rickey v. U.S.

See also:

(Appeal after remand) holding that aider and abettor must be on the ground.)

U.S. v. Varelli,
407 F.2d 735
452 F.2d 193

Holding that defendant must have participated in criminal transactions.

U.S. v. Key,
450 F.2d 1189

Holding that "aiding and abetting" means to assist the perpetrator of the crime.

White v. U.S.,
366 F.2d 474

"Aiding and abetting" means to assist the perpetrator of the crime.

U.S. v. Williams,
71 S.Ct. 595
341 U.S. 58

"To 'aid' and 'abet' . . . it is necessary that defendant in some way associate himself with the venture, that he participate in it as something that he wishes to bring about, and that he seek by

his action to make it succeed . . . it must (also) appear that the one so far participates in the commission of the crime charged as to be present actually or constructively, for the purpose of assisting therein . . . Generally, to find one guilty as a principal on the ground that he was an aider and abettor, it must be proven that he shared in the criminal intent of the principal and there must be a community of unlawful purpose at the time the act is committed." (emphasis supplied)

U.S. v. Moses,
122 F. Supp. 523

citing *Johnson v. U.S.,*
195 F.2d 673

"Aiding and abetting, as used in the statute (18 U.S.C.2(a)) means to assist the perpetrator of the crime."

U.S. v. Harris, et al,
441 F.2d 1333, p. 1336

"In order to aid and abet the commission of a crime, it is necessary that the supposed 'aider and abettor act' with knowledge that an offense is to be committed."

U.S. v. Turnipseed,
272 F.2d 106, p. 107

"In order to convict him as an aider and abettor, the government had to show conduct on his part amounting to counseling or other assistance in the prohibited activity."

Grimes v. U.S.,
379 F.2d p. 791

"To convice him as an aider or abettor the prosecution had to show conduct on his part amounting

to counseling or other assistance in Bryan's interstate criminal activity."

U.S. v. Honeycutt,
311 F.2d 660
(4th Cir.)

"One is guilty as an aider and abettor when he consciously shares in any criminal act . . . Aiding and abetting means to assist the perpetrator of the crime."

U.S. v. Carengella,
198 F.2d 3

At the very most, Mickey was a Seller to a Seller (Jett). While some of the citations above state that one "aiding and abetting" must physically be present at the time the crime was committed, certainly the rule laid down in *U.S. v. Moses* and *Johnson v. U.S., supra,* that a person accused of aiding and abetting must, at the very least, be present constructively if not physically and is controlling on the definition of this crime.

The trial court seemed to base its decision to let this case go to the jury on the single Fourth Circuit decision of *Backun v. U.S.*, 112 F.2d 635.

The *Backun* case holds that one who sells stolen property to another may be an aider and abettor if that person then transports the property in interstate commerce. We think that the *Backun* case argues for the defendant's position by implying in the decision that there must be a close continuity in time between the sale of the stolen property and the resulting illegal act, such as the sale of a stolen automobile knowing that it is to be immediately transported in interstate commerce.

We do not think that every person who sells a stolen automobile (for instance) is guilty of a federal crime because the automobile someday finds its way into interstate commerce.

If we are correct in our interpretation of the *Backun* case, then our motion for a judgment of acquittal (T-181-210) should have been granted.

However, even if our view of *Backun* is not accepted by this Court, it was understood by the trial court as having the fartherest "reach" of any case in this area. Thus, the *Backun* case stands as the case most supportive of the Government's position. That case holds that a seller of stolen goods may in some instances, be an aider and abettor of a subsequent act of placing these goods in interstate commerce.

It does not say, nor does any case say, that a seller of a seller may be an aider or abettor.

Thus, the *Backun* case sets an outer limit for the application of the statute making an aider and abettor a principal, and Mickey obviously, even construing the evidence most favorably to the Government, falls outside this outer limit.

There is another interesting aspect to the *Backun* case. Almost simultaneously the Second Circuit (L. Hand) was considering this same question, and after a much more exhaustive review of the cases reached a contrary result from the Fourth Circuit's decision in *Backun*.

> "Civilly, a man's liability extends to any injuries which he should have apprehended to be likely to follow from his acts. If they do, he must excuse his conduct by showing that the interest which he was promoting outweighed the dangers which

its protection imposed upon others; but in civil cases there has been a loss and the only question is whether the law shall transfer it from the sufferer to another. There are indeed instances of criminal liability of the same kind, where the law imposes punishment merely because the accused did not forbear to do that from which the wrong was likely to follow; but in prosecutions for conspiracy or abetting, his attitude towards the forbidden undertaking must be more positive. It is not enough that he does not forego a normally lawful activity, of the fruits of which he knows that others will make an unlawful use; he must in some sense promote their venture himself, make it his own, have a stake in its outcome. The distinction is especially important today when so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided. We may not agree that morally the defendants at bar should have refused to sell to illicit distillers but, both morally and legally, to do so was toto coelo different from joining with them in running the stills."

U.S. v. Falcone,
109 F.2d p. 581

This case holds simply that a seller of goods which the seller knows are to be used in an unlawful manner is not an aider and abettor (in the *Falcone* case, the goods were sugar and other ingredients to be used in the manufacture of illegal whiskey during prohibition).

This Court granted certiorari in the *Falcone* case presumably to speak on this conflict in these decisions

and affirmed the *Falcone* case. However, this Court's opinion in *Falcone* is not completely clear as to its effect on *Backun*.

The line of cases from the *Falcone* and *Backun* cases leads us to the conclusion that the *Falcone* decision is the law and ought to be applied uniformly.

> "The relation of buyer and seller even with knowledge of the character of the goods being sold is insufficient to make the buyer a conspirator."
>
> *U.S. v. Varelli*,
> 407 F.2d 735, p. 74
>
> citing *U.S. v. Falcone*, 61 S.Ct. 204
>
> (Case also states that aider and abettor "must be on the ground." p. 749)

We respectfully submit that Mickey cannot as a matter of law be guilty of being an aider and abettor of the cashing of these checks in July of 1970.

IX. THE SENTENCE GIVEN TO MICKEY WAS VIOLATIVE OF THE LAW AND VIOLATIVE OF HIS CONSTITUTIONAL RIGHTS.

Three defendants were involved in this event. These three boys charged with cashing these checks were young, single, and without any previous criminal background.

Mickey had been gainfully employed at the time of this occurrence and had an excellent work record. One of his previous supervisors testified for Mickey at the trial (Gordon Matlock T-340, et seq.). Mickey put his character in evidence at the trial and the Government made no attempt to rebut the fact that this young man had never been in any sort of trouble at all. He

was well thought of in his community where he grew up.

The three defendants received the following sentences:

Durden: pleaded guilty—probation.

Jett: made pre-trial motion to suppress which was denied—then he pleaded guilty—18 months in Tallahassee, Florida.

Jett pleaded guilty and Mickey was found guilty of the same crime. Jett admitted a series of other times when he had cashed these checks but he was not charged with them. Durden also pleaded guilty to essentially the same charge, and he also admitted to a series of other cashings. Durden is the one who changed his testimony from the statement he gave the FBI.

Needless to say, this was not a crime of violence. Since Mickey's involvement in December of 1969, he married and moved to Atlanta. He has a responsible job and has purchased a home. There is no further criminal activity or any other undesirable activity in his record either before or after December of 1969.

Mickey was not charged until October of 1972, or almost three years later. He had no knowledge of any pending charge, so his good behavior cannot be said to be under any compulsion except his own private determination to lead a law-abiding life.

While we are familiar with the rule that ordinarily probation is a matter of discretion with the trial court, we submit that such a rule is not as inflexible when multiple defendants are sentenced separately.

The Supreme Court in *Furman v. Georgia*, 408 U.S. 238 has just stricken down capital punishment as it was then imposed showing that the arbitrary and hap-

penstance way this punishment has been imposed makes it a violation of the Eighth Amendment.

That same rationale would apply to this case. When Durden, Jett and Mickey are all sentenced for the same crime and all seem to have the same backgrounds, the imposition of these divergent sentences would seem to be in violation of the principles of sentencing declared in *Furman v. Georgia*. We respectfully submit that the suspicion arises that the sentences were directly proportional to the "cooperation" each defendant gave the trial court:

(a) Durden—pleaded guilty—probation.

(b) Jett—made pre-trial motion to suppress which was denied—then he pleaded guilty—18 months in Tallahassee, Florida.

(c) Mickey—pleaded not guilty—jury tried—3 years (presumably in the penitentiary in Atlanta).

We respectfully submit that Mickey is entitled to no greater punishment in this case than Durden unless some finding of fact can be made to indicate that he is to be treated differently from any other similar defendant sentenced for a similar crime (in this case, Durden).

At the oral argument held before the Fourth Circuit there was a discussion of this point. Judge Winter expressed the viewpoint that one of the purposes of punishment (sentencing) was rehabilitation. He then made a statement to the effect that a judge would be justified in determining a defendant's sentence by considering whether or not there had been a plea of guilty because that would indicate whether or not the defendant had begun to be rehabilitated.

We respectfully submit that Judge Winter is wrong, and no part in determining the sentence and in determining whether or not to give probation should not be based on whether the defendant had pleaded not guilty.

The whole aspect of criminal sentencing has begun to consume the writer, and one of the most thought-provoking items in this entire area is a recent book by U.S. District Judge (S.D.N.Y.), Marvin E. Frankel entitled *Criminal Sentences: Law Without Order* (Hill and Wang, 1973). This book has caused us to rethink many of our previous conceptions concerning criminal sentencing, especially in the area of appellate review. These are a few of Judge Frankel's thoughts:

> ". . . We have simply another illustration of the anomalous notion that judges should be left to do much as they please with respect to sentencing. I repeat my most basic objection: that such unfettered variations are intolerable in a rational system of law . . ." p. 73

> "The basic point remains as I have stated it: neither the federal courts nor most states provide for any effective appellate review of sentences. I cannot know whether the reader finds this as horrendous as I do after living with it as a fact of professional life for many years. Consider that a civil judgment for $2,000 is reviewable in every state at least once, possible on two appellate levels. Then consider the unreviewability of a sentence of twenty years in prison and a fine of $10,000. Consider that a distinguished committee of the American Bar Association, not normally an agency of revolution, when it urged appellate review of sentences in a report adopted and endorsed by the association in 1968, pointed out "that in no other area of our law does one man exercise such unrestricted power (as the trial

judge's unreviewable sentencing power). No other country in the free world permits this condition to exist . . ." p. 76, 77

"Senior Judge Simon Sobeloff, former Chief Judge of the Fourth Circuit, has long argued for review of sentences, lately adding to his writing and talks his service as head of the valuable A.B.A. Advisory Committee mentioned a few pages ago." p. 78

"The contention that sentencing is not regulated by rules of 'law' subject to appellate review is an argument for, not against, a system of appeals. The 'common law' is, after all, a body of rules evolved through the process of reasoned decision of concrete cases, mainly by appellate courts. English appellate courts and some of our states have been evolving general, legal 'principles of sentencing' in the course of reviewing particular sentences claimed to be excessive. One way to begin to temper the capricious unruliness of sentencing is to institute the right of appeal, so that appellate courts may proceed in their accustomed fashion to make law for this grave subject." p. 84

"I repeat my intention to resist speculations in the field of constitutional law. Reluctantly turning from the capital punishment decision, I merely register the view that the central point about whimsical and unequal sentencing is a principle germane in non-capital cases. This could mean one day that the Supreme Court might deem itself constrained finally to move more broadly, on constitutional grounds, against the kinds of 'wanton and freakish' disparities I (and so many others) have deplored." p. 104

"Again, the point is made in all its stark horror by the compelling evidence that widely unequal sentences are imposed every day in great numbers for crimes and criminals not essentially distinguishable from each other."

> "The sentencing powers of the judges are, in short, so far unconfined that, except for frequently monstrous maximum limits, they are effectively subject to no law at all. Everyone with the least training in law would be prompt to denounce a statute that merely said the penalty for crimes 'shall be any term the judge sees fit to impose.' A regime of such arbitrary fiat would be intolerable in a supposedly free society, to say nothing of being invalid under our due-process clause. But the fact is that we have accepted unthinkingly a criminal code creating in effect precisely that degree of unbridled power." p. 8

> "This does not mean, of course, that everybody pays the same tax or is held to the same standards of liability. It does mean that the variations are made to turn upon objective, and objectively ascertainable, criteria—impersonal in the sense of the maxim that the law 'is no respecter of persons'—and, above all, not left for determinating in the wideopen, uncharted, standardless discretion of the judge administering 'individualized' justice." p. 11

> "Such individual, personal powers are not evil only, or mainly, because evil people may come to hold positions of authority. The more pervasive wrong is that a regime of substantially limitless discretion is by definition arbitrary, capricious, and antiethical to the rule of law." p. 23

We respectfully submit a proposal which has not *yet* found much favor with appellate courts, namely, that trial courts should make findings of fact in connection with the sentences imposed.

If findings of fact are a requirement for a civil matter in which the judge sits as a trior of the fact how much more applicable it would seem to a criminal sentencing.

We have found some case authorities in this area:

> "The question is simply whether there has been an abuse of discretion and is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. (cite omit) It takes account of the law and the particular circumstances of the case and is 'directed by the reason and conscience of the judge to a just result'. (cite omit) While probation is matter of grace, the probationer is entitled to fair treatment and is not to be made the victim of whim or caprice."
>
> *Burns v. United States,*
> 287 U.S. 216 at 222, 223

In a case out of the Seventh Circuit, the Court of Appeals has expressly held:

> ". . . and while Court entertaining application for probation could consider, inter alia, whether defendant had entered "not guilty" plea when he had only a frivolous defense, court could not deny probation solely because defendant had elected not to enter guilty plea."
>
> *U.S. v. Wiley,*[1]
> 267 F.2d 453 (2)

> "In discharging his duty of imposing a proper sentence, the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances of the crime."
>
> *Williams v. Oklahoma,*
> 358 U.S. 576 at 585

[1] The Wiley case is also interesting because it affirms a conviction for receiving stolen goods, although the defendant is described as an "aider and abettor" in receiving the stolen goods. This would give support to our position that Mickey Talbert was charged with the wrong crime.

"The above Supreme Court precedents establish that while the District Court is permitted broad latitude in discharging its duty to impose a proper sentence, the exercise of the District Court's discretion will be subject to appellate scrutiny under limited circumstances, such as: the reliance by the sentencing court on improper factors or the failure of the sentencing court to evaluate the available information in light of the facts relevant to sentencing" . . .

"The process of sentencing an offender, however, is now wholly immunized from judicial review solely because the sentence imposed upon the offender falls somewhere within certain statutory limits."

U.S. v. Daniels,
446 F.2d 967 at 969

"It is a well known fact that disparity in sentencing causes considerable resentment among prison inmates and it is made worse when the disparity exists in the same Circuit."

U.S. v. McKinney,
466 F.2d 1403 (6th Cir.)

"The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."

Williams v. New York,
337 U.S. 241 at 247
69 S. Ct. 1079 at 1083

(death imposed after jury verdict of life upon considering past offenses)

We respectfully urge that the trial court ought to enter some findings of fact which would justify the disparity in these sentences (or any sentences) involving

the same crime committed by persons of the same background and same previous record (no previous record for any of them).

REASONS FOR GRANTING CERTIORARI

1.

This Court should grant certiorari to determine the crucial issue raised in this appeal as to whether or not it is a violation of due process to refuse to grant criminal defendants the right to the opening and concluding arguments before the jury. This is an issue which is present in every similar jury trial whether state or Federal.

2.

Certiorari should be granted in this case to speak definitely on the role of appellate review in criminal sentencing. Certiorari should be granted because this is an entire area which has only been summarily touched upon in all of the reported cases.

3.

Certiorari should be granted in this case because this appeal asked that the circuit courts methods in federal courts be more clearly defined and restricted in that a circuit court should be required to make some finding of fact before committing a convicted defendant to imprisonment. Without such standards there can not be any effective appellant review.

4.

Certiorari should be granted in this case as a logical outgrowth of the decision in *Furman v. Ga.*, 408 U.S. 238, and the question of whether or not imprisonment

can constitute cruel and unusual punishment if inflicted arbitrarily in relation to other defendants.

5.

Certiorari should be granted in this case because the Court of Appeals for the Fourth Circuit has failed to follow its own case precedents and authorities regarding the sequestration of witnesses, and this defendant has been tried in a manner inconsistent with previous rulings of the same Circuit Court of Appeals.

6.

Certiorari should be granted in this case because the defendant was denied without a full use and right to use the voir dire examination. This denial of this right to this defendant was incorporated with previous decisions of the Fourth Circuit Court of Appeals, other Circuit Courts of Appeals, and of the Supreme Court of the United States.

7.

Certiorari should be granted in this case to speak on the issue of whether or not a prosecutor can produce evidence against a defendant on a number of separate indictments and then dismiss some of the indictments leaving the jury with the full knowledge of the other charges and the other evidence. Certiorari should be granted in this case because of a collateral question this appeal asks whether or not there is any burden on the prosecutor to determine before trial whether or not he will dismiss any of the charges against the defendant absent from issuing of service, exercising negligence or unforeseeable circumstances on the part of the prosecutor. Otherwise, the prosecutor has an uncontrolled

discretion to place in evidence collateral matters or other allegations and then to dismiss them after the jury has heard all of the evidence.

8.

Certiorari should be granted in this case because the findings of the trial court are in conflict of the decisions of the Supreme Court of the United States in defining said conflicts of "aiding and abetting". This court spoke of this in the case of *U.S. v. Falcone*, 61 S. Ct. 204 and this is an area which should be further defined by this Court.

ERRATA

The certified record of this case from the Fourth Circuit Court of Appeals has ordered and shall be filed after the date of the filing of this Petition for Certiorari, likewise, the transcript and oral argument (which has been referred to in portions of this brief) is being prepared and will also be filed after the filing of the petition.

APPENDIX "A"

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

UNITED STATES OF AMERICA *Plaintiff,* V. HAZEL M. TALBERT, ET AL *Defendants.*	CASE NOS. 72-298 and 72-300

REQUESTED VOIR DIRE QUESTIONS OF DEFENDANT, HAZEL M. TALBERT

1) What is your present occupation?

2) What is your husband's (wife's) occupation or employment?

3) Have you ever been employed by a bonding company, an insurance company, or an indemnity company?

4) If so, did any of these companies insure against stolen, forged, or lost checks or travelers checks?

5) Have you or any immediate members of your family ever been employed in any capacity by any law enforcement agency?

6) If so, describe the law enforcement agency, and your duties, and the dates of any such employment.

7) Have you or any immediate members of your family every been employed or engaged as a private investigator?

8) Have you ever worked for a bank or any other business which sold travelers checks?

9) If so, describe the company and your duties with that company.

10) Have any of you ever had occasion to cash a forged or stolen travelers check whether cashed by you personally or by you in the course of your employment?

11) If so, describe the details of any such occurrence.

12) Have any of you or any members of your immediate family ever participated or assisted in any way in any investigation or prosecution for any crime dealing with lost, stolen, or forged checks or travelers checks?

13) If so, describe the details of any such occurrence.

14) Have you, or any member of your immediate family, or any of you, ever had any checks or travelers checks stolen from you, or forged on your signature?

15) If so, describe the details of any such occurrence.

16) Do you realize and understand that the fact that an indictment has been returned by the Grand Jury against this Defendant is no indication whatsoever that the Defendant is guilty of this crime?

17) Do you understand that the Defendant had no opportunity to appear himself before the Grand Jury which indicted him, nor did he have any opportunity to call any witnesses on his behalf or to offer any evidence on his behalf before the Grand Jury?

18) Do you understand that the Grand Jury proceeding was conducted solely by the United States attorney and when the Defendant here was indicted

that neither a judge, the Defendant, the Defendant's attorney, nor any witness for the Defendant was present?

19) Are you predisposed to render a "guilty" verdict against this Defendant because a Grand Jury indictment was issued against him?

20) Are you willing to accept and apply the proposition of law which says that the Government (the prosecution) has the burden of proving each and every essential allegation it makes against this Defendant beyond a reasonable doubt?

21) Are you willing to apply this standard in this case and give to this Defendant every reasonable doubt created by the evidence?

22) Do you understand that the prosecution will present all of its case and call all of its witnesses before the Defendant will be allowed to call any of his witnesses or to introduce any evidence on his behalf?

23) Will hearing the prosecution's witnesses and evidence first create any impression in your mind that this Defendant is guilty of the acts alleged against him?

24) Do you understand that in this trial the Defendant does not have to explain or to satisfy your minds as to any fact or as to his innocence, but, rather, the prosecution has the burden of proving his guilt, and that this proof must be beyond a reasonable doubt in your mind?

25) Are you willing to be bound by this principle of law in your deliberations as to whether or not this Defendant is guilty or innocent of the charges?

26) Do you understand that the Defendant has the right to choose to remain silent, and not to offer any testimony either by himself or by other witnesses and that the failure to offer any evidence or his choosing to remain silent would not create any presumption of guilt against him?

27) Do you understand that if the Defendant elects not to testify or elects not to offer any other evidence, that the burden of proving each and every essential element of this case beyond a reasonable doubt would still be with the prosecution?

28) Are you willing to be bound by and to follow these and all of the other principles of law I have mentioned to you?

29) Are you willing to be bound by and to follow any other instructions of law the Court may give you during the course of the trial or at the end of the trial?

30) Even if the evidence should disclose to your mind (and I do not intimate that the evidence will disclose any such thing) that the Defendant was guilty of some other crime or act other than the one for which he is on trial here, would you allow any such feeling on your part to influence your verdict as to the crime alleged against the Defendant in this trial?

31) If the prosecutor fails to prove to you beyond a reasonable doubt that the Defendant committed the crimes alleged against him in this trial, but you feel that he may have committed some other crime which has not been charged, would you return a verdict of "not guilty" in this case?

32) Will you refuse to allow other jurors to override

your convictions in this matter and to substitute their beliefs for yours?

33) Are you willing to stand by your convictions in your deliberations in the jury room even though some or all of the other jurors disagree with you?

34) Are you willing to incur the displeasure of some of the other jurors to stand by your convictions rather than give in to their convictions simply to avoid any displeasure on their part?

Respectfully submitted,

/s/ GLENVILLE HALDI

Glenville Haldi,
Attorney for Defendant,
Hazel M. Talbert

CERTIFICATE OF SERVICE

This is to certify that I have this date, personally handed a copy of the within and foregoing Requested Voir Dire Questions of Defendant, Hazel M. Talbert, to the United States Attorney, in the within and foregoing case.

This_____day of February, 1973.

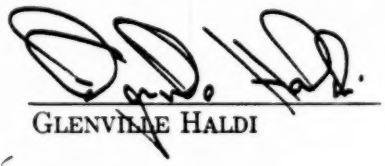
GLENVILLE HALDI,
Attorney for Defendant,
Hazel M. Talbert

CERTIFICATE OF SERVICE

I certify that I have this date, according to Rule 33 of the Rules of the Supreme Court of the United States, served counsel for the United States of America with three copies of the Petition for Writ of Certiorari herein by depositing same in the United States mail, with adequate first class postage prepaid addressed to:

Michael A. Pulliam, Esquire
John K. Grisso, Esquire
United States Courthouse
Columbia, South Carolina 29201

This 10th day of December, 1973.



GLENVILLE HALDI

No. 73-905

APR

In the Supreme Court of the United States

OCTOBER TERM, 1973

HAZEL M. TALBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

HENRY E. PETERSEN,
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-905

HAZEL M. TALBERT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The court of appeals wrote no opinion. Its order affirming the conviction (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1973. Petitioner's timely motion for rehearing was denied by the court of appeals on November 14, 1973. The petition for a writ of certiorari was filed on December 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error for the trial court to deny the defense motion for discovery of information gathered by the government on prospective jurors.

2. Whether it was error for the trial court to fail to ask prospective jurors certain *voir dire* questions propounded by petitioner.

3. Whether it was error for the trial court to deny petitioner's motion for sequestration of witnesses.

4. Whether a mistrial should have been declared after the government dismissed one of the two indictments at the close of its case.

5. Whether the jury was erroneously charged.

6. Whether petitioner was properly charged as an aider and abettor.

7. Whether petitioner's sentence to three years' imprisonment was unlawful.

STATEMENT

After a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted on five counts of aiding and abetting the cashing of stolen travelers' checks, in violation of 18 U.S.C. 2314 and 2. Petitioner was sentenced to five concurrent terms of three years' imprisonment. The court of appeals affirmed *per curiam* (Pet. App. B).[1]

In the fall of 1969, petitioner entered into an agreement with Loren Nauss, a part-time bank employee, whereby Nauss was to steal travelers' checks from the bank at which he worked and turn them over to petitioner, who would dispose of them and pay him a part of the proceeds (Tr. 57-58, 61-62, 75-77).

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[1]There were two indictments involving petitioner: No. 72-300, which named Nauss, Jett and petitioner as defendants and referred to checks cashed in July of 1970, and No. 72-298, which named the same three and Charles Durden and referred to checks cashed in February 1970. The latter indictment was subsequently dismissed (see p. 5, *infra*) (Pet. 6-8).

In December 1969, Nauss actually stole some checks and delivered them to petitioner (Tr. 60, 63-64). Petitioner offered the checks to his roommate, Weldon Jett, Jr., on condition that Jett cash them and give part of the money to him (Tr. 130-132, 137). Accepting the offer, Jett, in turn, agreed to give some of the checks to Charles Durden, who was to cash them and return a portion of the money to Jett, who then would pass on a percentage of that money to petitioner (Tr. 148-150).

Later, becoming frightened, Jett decided not to cash any more of the checks personally (Tr. 146), but entered into an agreement with Bucky Dudley whereby Dudley was to use the checks for personal purchases and split any change from his purchases with Jett (Tr. 144-147).

ARGUMENT

1. Petitioner contends (Pet. 10-11) that the trial court erred in denying his request for discovery of information gathered by the government on prospective jurors. In *Brady* v. *Maryland*, 373 U.S. 83, 87, on which he relies, this Court stated that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process *where the evidence is material either to guilt or to punishment*, irrespective of the good faith or bad faith of the prosecution" (emphasis added). The information sought here was not material to guilt or punishment and its disclosure was not required under *Brady*.

2. Petitioner contends (Pet. 11-15) that the trial court erred when it did not ask some of the *voir dire* questions he had propounded. Of the thirty-four questions submitted by petitioner, approximately one-half were presented by the court to the jury in substantially the same form as they had been submitted by petitioner (Tr. 5-7, 11-12, 15). These questions provided a more than adequate test of the qualifications and competency of the jurors. Many of

the remaining questions involved the conduct of grand jury and courtroom proceedings, burden of proof, reasonable doubt, and presumption of innocence. The court properly deferred discussion of these legal principles until the jury was charged (Tr. 368-392).

The trial court is vested with broad discretion regarding the questions to be asked prospective jurors on *voir dire*. See, *e.g.*, *Lowther* v. *United States*, 455 F. 2d 657 (C.A. 10); *United States* v. *Linn*, 438 F. 2d 456 (C.A. 10); *Haslam* v. *United States*, 431 F. 2d 362 (C.A. 9), opinion adhered to 437 F. 2d 955, certiorari denied, 402 U.S. 976. The court clearly acted within the limits of its proper discretion in this case.

3. Petitioner claims (Pet. 15-18) that it was error for the trial court to deny his motion for sequestration of witnesses. Sequestration of witnesses is also a matter within the sound discretion of the trial judge. "[T]his ruling will not be reversed 'in the absence of manifest prejudice resulting from the presence of witnesses during the trial of the case.' " *United States* v. *Harris*, 409 F. 2d 77, 81 (C.A. 4), certiorari denied, *sub nom. Brown* v. *United States*, 396 U.S. 965, citing *Mitchell* v. *United States*, 126 F. 2d 550, 553 (C.A. 10). Petitioner has failed to show how the denial of his request for sequestration resulted in "manifest prejudice." His claim of error rests entirely on the change of testimony of the unsequestered witness Durden. Petitioner alleges that Durden, after first stating that Jett had given him the stolen travelers' checks, later testified, after hearing the testimony of others, that Jett sold them to him (Tr. 218). The means by which Jett transferred these checks to Durden is immaterial, since the evidence at trial clearly established that petitioner delivered the stolen checks to Jett in exchange for a percentage of the face value of the checks (Tr. 137).

Once defense counsel expressed surprise at the change in Durden's testimony, moreover, the court granted counsel considerable latitude in cross-examining him, although he was the defendant's witness (Tr. 286-295). To the extent that the evidence was relevant, the jury consequently had before it an adequate record on which to assess the credibility of the witness.

4. Petitioner contends (Pet. 18-20) that the trial court erred in refusing to declare a mistrial after the government dismissed indictment No. 72-298 (see note 1, *supra*) at the close of its case, on the ground that the government had deliberately delayed dismissal to permit prejudicial evidence to be adduced. Petitioner has presented no evidence to support this attribution of motives and the record reflects that the decision to dismiss indictment No. 72-298 was not made in advance, but was only made at the close of the government's case (Tr. 198). Moreover, the trial court explained the meaning of that dismissal and instructed the jury not to consider the charges of the dismissed indictment during deliberation (Tr. 368-369).

Petitioner also claims that he was "tricked" into calling Durden to the witness stand. This is not so. Once indictment No. 72-298 was dismissed, the government did not need to proceed with that part of the case as to which Durden, who had pleaded guilty in No. 72-298, would have been a witness. Petitioner's decision thereafter to call Durden as his own witness was entirely his own.

5. Petitioner also contends (Pet. 20-22) that the denial of his motion to make the opening and closing argument was a violation of due process. However, the prosecution "has the right and the duty" to make the opening statement in order "to explain to the jury the issue or issues to be tried." 5 Wharton's *Criminal Law and Procedure*, §2032 (12th ed.). The order of summing up varies from one

jurisdiction to another. The "prevailing practice," however, is to let the government make the closing argument. See *id.* at §2077. The court clearly did not commit reversible error in following the traditional order of argument.

6. Petitioner further contends (Pet. 23-24) that the trial court erred by instructing the jury on conspiracy although no conspiracy was charged, thereby enabling the jury to convict him of conspiracy. The trial court, however, did not instruct the jury on conspiracy. The portion of the charge to which petitioner refers was an instruction on aiding and abetting. Nowhere in the course of that instruction is "conspiracy" mentioned or impliedly charged, nor was petitioner convicted of conspiracy.

7. Relying in large measure on *United States* v. *Falcone*, 311 U.S. 205, petitioner asserts that "a seller of goods which the seller knows are to be used in an unlawful manner [cannot be] * * * an aider and abettor" (Pet. 31). In *Direct Sales Co.* v. *United States*, 319 U.S. 703, 709, however, this Court stated that *Falcone* did not hold, as petitioner contends, "that one who sells to another with knowledge that the buyer will use the article for an illegal purpose cannot, under any circumstances, be found guilty of conspiracy with the buyer to further his illegal end." *Falcone* created "no such sweeping insulation for sellers to known illicit users" (*ibid*); it only meant "that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy." (*ibid.*). In upholding the conviction of a mail-order drug corporation for selling suspiciously large quantities of morphine sulphate to physicians whom it had been told were involved in illicit drug traffic, the Court stressed that, in *Direct Sales*, in contrast to *Falcone*, the goods sold were

"inherently" more "susceptib[le] to harmful and illegal use" and thus by "their very nature" gave "the seller notice the buyer will use them unlawfully." (*Id.* at 710). Known stolen checks similarly provide notice of unlawful purpose. Indeed, petitioner delivered the checks to Jett with the clear understanding that they were to be used illegally for their mutual profit.

8. Petitioner finally contends (Pet. 32-40) that the sentence he received violated his constitutional rights. Petitioner was tried and convicted on five counts of an indictment charging aiding and abetting the transportation of forged travelers' checks in interstate commerce, in violation of 18 U.S.C. 2314 and 2.[2] He faced a maximum penalty of fifty years' imprisonment and a $50,000 fine, but was sentenced only to three years' imprisonment. Petitioner's co-defendants, Durden and Jett, who pleaded guilty to lesser charges, received lesser punishments. No provision of the Constitution requires that a defendant found guilty of five counts receive the same sentence as defendants found guilty of only one.[3]

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[2]Section 2314 provides for a maximum penalty of a $10,000 fine and ten years' imprisonment.

[3]The record reflects the court's sensitivity to the issue of sentencing. At sentencing the judge stated:

> Now, I have talked more than I have than I can ever remember, but this case has given me about as much concern as any that I've tried in fifteen or twenty years because fundamentally these boys lives are ahead of them and I know it. (Tr. Sen. 19).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

NO. 73-905

UNITED STATES OF AMERICA,

Appellee,

vs.

HAZEL M. TALBERT,

Appellant.

MOTION FOR RECONSIDERATION

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IN THE

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NO. 73-905

UNITED STATES OF AMERICA,

Appellee,

vs.

HAZEL M. TALBERT,

Appellant.

PART I

STATEMENT OF THE ISSUE

The Appellant contends that the sentence imposed on him is unconstitutional. This contention is based on two different grounds.

(a) The Appellant contends that the *procedure* by which he was sentenced was constitutionally defective in that the trial court punished him for pleading "not guilty" more severely than it punished co-defendants who pleaded guilty.

This is a ground of attack which has been specifically approved by this Court in previous decisions which state that improper considerations by a trial court used in sentencing amount to a denial of due process.

(b) The Appellant contends that his sentence is substantively unconstitutional because of its severity in

relation to the sentences received by co-defendants for the same crime.

This is a ground of attack which this Court has traditionally not accepted. However, some federal courts of appeals have allowed such an attack to be successfully made, and this Court seemingly has done so in its decision in *Furman v. Georgia*, 408 U.S. 238, outlawing the death penalty.

We ask the Court not only to apply accepted procedural standards to this case but also to review the (seeming) policy that the severity of a sentence per se cannot be the subject of appellant review.

PART II

SUMMARY STATEMENT OF FACTS

The Appellant was convicted on five counts of "aiding and abetting" in the illegal cashing of stolen Travelers' checks (each count was on a separate $10.00 check for a total of $50.00) and sentenced to serve three years imprisonment. The offenses, basically, occurred at one time. The "aiding and abetting" involved two other co-defendants charged with the same five counts. One of the co-defendants, Charles Otis Durden, pleaded "guilty" to one count, had the other four counts nol prossed, and was sentenced to a probationary term. The other co-defendant, Weldon Odel Jett, originally pleaded "Not guilty," moved to suppress certain of the government's evidence, and, when that motion was denied, changed his plea to "guilty" of one count and had the other four counts nol prossed. Jett was sentenced to 18 months imprisonment.

The background of the three co-defendants was

strikingly similar. All of them were of college age, single, lived in a college environment (Talbert, while living with college age youths did not actually attend college but had a full time job instead), had absolutely no prior criminal record or activity, and had nothing in their background to indicate either any prior undesirable activities nor any proclivity for future illegal conduct.

The indictment was returned almost two years after the illegal act had taken place. All three defendants had all but forgotten about the incident, and all had led exemplary lives since the incident, and had done so out of no fear or compulsion concerning this case but had done so as their accepted and standard way of life.

The Appellant has contended (and the government has never disputed this contention) that there is no dissimilarity whatsoever between any of the three co-defendants either as to background, degree of participation in the crime,[1] or freedom from any illegal activity since the crime.

The Appellant contends (and the government has never disputed this contention) that his sentence was more severe than the other co-defendants for the sole reason that he pleaded "not guilty" and was convicted by a jury. The following chart shows the only dissimilar features of these three co-defendants in this entire case:

(a) Durden—pleaded guilty—received probated sentence.

(b) Jett—pleaded not guilty—made pre-trial motion to suppress which was denied—changed

[1] If anything, the Appellant's participation was less than that of the other two co-defendants. However, as an "aider and abettor" their conduct is attributable to him, and, thus, his acts are the same as theirs.

his plea to guilty—sentenced to serve 18 months.

(c) Talbert—pleaded not guilty—convicted by jury—sentenced to serve 3 years.

PART III

CONSTITUTIONAL PROVISIONS RELIED UPON

"No person should be . . . deprived of life, liberty . . . without due process of laws . . ."

Amendment Five to the
Constitution of the
United States

"Excessive bail shall not be required and excess fines imposed, nor cruel and unusual punishment inflicted."

Amendment Eight to the
Constitution of the
United States

PART IV

ARGUMENT AND CITATION OF AUTHORITIES

A.

IS IT CONSTITUTIONALLY PERMISSIBLE TO ASSESS A MORE SEVERE PUNISHMENT ON A DEFENDANT BECAUSE HE PLEADS NOT GUILTY THAN WOULD HAVE BEEN IMPOSED BY A PLEA OF GUILTY?

As to the question of whether or not an appellate court can review a sentence on the procedural aspects of imposition of a sentence, there seems to be no doubt and it is now a settled question that the courts can

review any sentence imposed which violates the due process aspects of the Federal Constitution:

Townsend v. Burke
334 U. S. 736

Williams v. New York
337 U. S. 241

Green v. U. S.
365 U. S. 301

North Carolina v. Pearce
395 U. S. 711

U. S. v. Tucker
404 U. S. 443

and, of course,

Furman v. Georgia
408 U. S. 238

The question remaining is—is it Constitutionally permissible (i.e., a denial of due process) to increase a sentence imposed based on the fact that the defendant pleaded "not guilty" and insisted on a trial as opposed to entering a plea of guilty? We maintain that this is not a valid consideration in the sentencing of criminal defendants, and that is the first issue presented in this Motion for Rehearing.

At the oral argument before the Fourth Circuit, that Court stated that this was a valid consideration which the trial judge could evaluate and use in passing sentence.

> *Haldi:* "Now, we have raised the question of sentence. It is my understanding that all three of Your Honors have sat as District Judges. I have been reading, recently, a book and in my inept way I have lost it about half-way through the book.

The book is entitled 'Criminal Sentencing,' and it is very critical of the lawyers, of the trial courts and of the Appellate Courts in our sentencing process, and perhaps the reason the book is remarkable is that it's written by a United States District Judge in New York, Judge Kauffman. Judge Kauffman says the sentencing procedure is perhaps the most important or one of the most important in the entire trial processes, and he indicates that trial judges give him the most trouble. And he indicates that in his experience it's the type of thing that weighs very heavily on a Judge, and yet there are very few guidelines. The government relies on the adage again that the sentence is almost entirely within the discretion of the trial court. I would like to submit, Your Honors, that this is an idea whose time, if it has not come, is coming. And I think we have to—in this case is a perfect example—four young men involved in a—and again I'm assuming that Mickey Talbert is guilty for the point of argument at this point of time—four young men, 22 years of age and around the college age, they come up charged with identically the same crimes. One boy pleads guilty, gets probation. One boy initially pleads not guilty, goes through some motions, but ultimately changes his plea to guilty and gets 18 months. Another boy pleads not guilty, he's tried and gets three years. Now, as a matter of fact in our case, we have introduced in the trial the character of our witness. There's not a crime of violence, total of $50.00 involved in cashing five Travelers' checks over a period of time that my client was convicted of. And we simply ask where is the rationale in sentencing? There must be some rationale in sentencing, just as there has to be rationale in the trial process."

Judge: "Well, isn't it obvious here what it was?"

Haldi: "Your Honor, the only thing it seems to me is that he got penalized for going to trial."

Judge: "No. The other way of looking at it is the other two got the benefit of their admission of guilt which is the first step in the rehabilitative process."

Haldi: "That's another way of saying he got penalized for pleading not guilty."

Judge: "Well, you can state it in converse that way. But I think if you state it affirmatively, the way I do, that this is the ground and it is a perfectly acceptable ground. You don't punish people just for the sake of vengeance, Mr. Haldi. You punish them for two purposes—the first, and this is highly problematical, not everybody subscribes to this, because of the deterrent effect on others who might be inclined to commit the same crime. The other and more important rationale of punishment is the rehabilitative aspect. And you don't begin to rebuild, you don't begin to rehabilitate until you get firm recognition in the subject that he did wrong, that he was guilty. Now, as soon as accused, or at least prior to trial, the other two come forward and make this admission, then this provides a basis on which the District Judge can conclude that the sentence to be imposed on them need not be as harsh as that which might be imposed on another defendant who has the same degree of culpability, roughly the same background, roughly the same record or lack of record, but who nevertheless, even though he is guilty, is unwilling to admit his guilt."

Haldi: ". . . what Mickey Talbert has done to be punished for is no greater than what they've done, but as Judge Widner suggests what he's done to be punished for is that he's refused to admit and plead guilty."

Judge: "He's put himself in the place as Judge Widner says so that the Trial Judge could not say

> that he had commenced his rehabilitation process and he needed to be confined." [2]

Therein lies the issue which we ask this Court to decide and we feel that further elaboration will only obscure the point. Our only concern at stopping at this place in the argument is the fear of many trial attorneys that the failure to argue a point by numerous citations and other arguments indicate a lack of confidence and or enthusiasm for the point. For that reason alone, it is difficult to stop here, and we make only the statement that this point is urged with our maximum sincerity.

B.

MAY AN APPELLATE COURT REVIEW THE SEVERITY OF A SENTENCE WHICH IS WITHIN THE STATUTORY LIMITS?

This second question is more dramatic in the sense that it seems not to have been answered finally. Any review of the cases and commentaries in this area must lead to the conclusion that while appellate courts in the past have indicated that there is no appellate review of a sentence within the statutory limits on the grounds of excessiveness, later decisions have greatly eroded this concept and the future seems sure to provide that appellate review is coming as surely as the dawn.

Truly, this is an idea whose time is in the process of coming. We only hope that it comes in time to salvage

[2] The passage above quoted came from a tape recording made by the Fourth Circuit Court Reporter. Since edited transcripts of taped conversations are not much in favor in some quarters, the original tape recording has been deposited with the Clerk of this Court. This tape was not in our possession at the time of the filing of the original application for Certiorari.

the future of this Appellant, and that he does not become one of those unfortunate discards of society who while helping to effect change was nevertheless made to pay the penalty of the old system.

BACKGROUND OF APPELLATE REVIEW

Prior to 1891, there is no dispute that the federal appellate courts were empowered to review and modify sentences (Act of March 3, 1879. Ch. 176,§3, 20 Stat. 354, *U.S. v. Lynn*, 11 F. 57, *Bates v. U.S.* 10 F. 92). However, by the Act of March 3, 1891 (Ch. 517 §11, 26 Stat. 829), somewhat different language was enacted which enabled the Ninth Circuit to announce that the Federal Appeals Courts had lost the power to review sentences. [*Freeman v. U.S.* 243 F. 353, cert. denied 249 U.S. 600 (1919)].

The Freeman opinion is much unloved by commentators[3] (and, presumably, by defendants) and was certainly not a mandatory construction of the statute of 1891.

The Congress has also attempted many enactments to overrule *Freeman* but none have been successful so far.[4]

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[3] See, for example, *Appellate Review of Sentences And The Need for a Reviewable Record*, Duke Law Journal, January 1974, Vol. 1973 No. 6, p. 1357-1376, on p. 1359. The author characterizes this as ". . . the dubious statutory construction in *Freeman* . . ." and on p. 1358 speaks of ". . . the judge made rule against sentence review."

[4] E.g. S. 1540, 90th Cong. (1967) H. R. 6188 91st Cong. (1969) S. 1561, 91st Cong. (1969) H. R. 5180, 91st Cong. (1969) S. 2228, 92nd Cong. (1971) S. 2228, 92nd Cong. (1971).

The *Freeman* decision is the fountainhead for numerous statements such as this:

> If there is one rule in the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by statute.
>
> *Gurera v. U.S.*
> 40 F. 2d 338, 340-341

Judge Irving Kauffman of the United States Court of Appeals for the Second Circuit made this statement in 1962:

> "The United States is the only nation in the Free World where one judge can determine conclusively, decisively and finally the minimum period of time a defendant must remain in prison, without being subject to any review of his determination." [5]

If these sweeping pronouncements had been uniformly followed, there would be no need to go further, but many exceptions (particularly several recent and notable decisions) occur, and therein makes the constitutional test for this principle, and one exceptionally suited for certiorari since many of the circuit courts have expressed absolutely contradictory rules in this regard.

The following cases have reviewed the sentence imposed on a criminal defendant (all of them "legal" sentences in the sense of being within the statutorily

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[5] Appellate Review of Sentences: A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit, 32 F.R.D. 249, 260-61.

prescribed range) and reversed on the ground (either expressly or impliedly) that the sentence is excessive.

Millich v. U. S.
282 F. 604 (Ninth Circuit 1922)

(The Court expressly stated that an appellate court *has the right to* review and modify a sentence.)

U. S. v. Wiley
278 F. 2d 500 (3-5)
(Seventh Circuit 1960)

(Here again the Court expressly stated that it has the power to review sentences.)

Leach v. U. S.
320 F. 2d 670 (D.C.C.A., 1963) (First Appeal)

Leach v. U. S.
334 F. 2d 945 (D.C.C.A., 1964) (Second Appeal)

Frady v. U. S.
348 F. 2d 84 (D.C.C.A., 1965)

Coleman v. U. S.
357 F. 2d 563 (D.C.C.A., 1965)

(In this case, Tamn, Danaher, and Burger dissented stating that an appellate court was without authority to revise a lawful sentence. Here again, not only do some courts differ as to what an appellate court can do, but there is much debate between the judges themselves as to what power of review an appellate court possesses.

U. S. v. McKinney
427 F. 2d 449 (Sixth Circuit 1970) (First Appeal)

U. S. v. McKinney
466 F. 2d 1403 (Sixth Circuit, 1971, 1972) (Second Appeal)

(Sentence expressly set aside as excessive.)

U. S. v. Daniels
467 F. 2d 967 (Sixth Circuit, 1971) (Rehearing En Banc denied)

(Sentence expressly set aside as excessive.)

U. S. v. Wilson
450 F. 2d 495 (Fourth Circuit 1971)

(The Court stated that it had no power to review the sentence, still it "scrutinized" the sentence and remanded it.)

We also point out the facts found by the Fourth Circuit in the *Wilson* case which are identical with this present appeal.

The case involved a youthful offender (23 years of age) who forged an endorsement on a government check. The amount in controversy was less than $100.00. The sentence was three years. There was no past criminal background of the defendant. The trial court did not consider sentencing under the Youth Corrections Act.

In the *Wilson* case, the Fourth Circuit reviewed the sentence and found it excessive. In this case, the Fourth Circuit did not even review the sentence.

Woosley v. U. S.
478 F. 2d 139 (Eighth Circuit, 1973) (En Banc decision, three dissents)

The Court's first sentence stated: "The federal courts have *uniformly* agreed that 'a sentence imposed by a

district judge, if within statutory limits, is generally not subject to review." (p. 141, emp. supp.) The Court then went on to review the sentence, and to set it aside as excessive.

While the decisions of the Supreme Court seem less inclined to specifically state that they are reviewing the excessiveness of the sentence, sentences have been reviewed and cases reversed based on the sentence:

U. S. v. Yates
356 U. S. 363

Hill v. U. S.
368 U. S. 424

Weems v. U. S.
217 U. S. 349

Townsend v. Burke
334 U. S. 736

Williams v. New York
337 U. S. 241

U. S. v. Tucker
404 U. S. 443

(Holding no appellate review of sentence, went on to reverse on the matter of the sentence *procedure*.)

North Carolina v. Pearce
395 U. S. 711

And, of course,

Furman v. Georgia
408 U. S. 238

In *Johnson v. Beto*, 337 F. Supp. 1371 (1972) a federal district court reviewing a Texas State court conviction and sentence on a habeas corpus application reversed based (in part) upon a legal conclusion that an excessive sentence showed a lack of due process during the trial.

Thus, while most federal courts (including the district courts on habeas corpus proceedings) state that there is no review of a criminal sentence within the legal limits, many cases appear which do precisely that—some do it directly and some indirectly. However, the fact that most courts feel that they are not empowered to make such a review makes this especially a matter for certiorari because some other courts *are* reviewing sentences.

Respectfully, this is a matter which should be settled.

It may be settled rather simply. 28 U. S. C. 2106 states:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry or such appropriate judgment, decree, or order or require such further proceedings to be had as may be just under the circumstances.

While this language would seem to be dispositive of the matter, the appeals courts have stated that it does not apply to criminal sentences and that only the Supreme Court can change this interpretation (*Smith v. U. S.* 273 F. 2d 462, 467-468. However, see dissent of Judge Murrah, 468-469).

The appellate courts also rely heavily on the denial of certiorari by the Supreme Court in cases which dearly have cried for guidance from this court. See *U. S. v. Rosenberg*, 195 F. 2d 583, 604-609.

EPILOGUE

There is no doubt that sentencing is one of the last great murky areas of our criminal law which has not

received exploration by modern standards. It is a matter which has troubled judges and commentators for years now and it seems to be on the verge of becoming a national outcry. Even a United States District Judge has been moved by what he considers an outrageous *system* to write a compelling little book on the subject.[6] This book has received much attention in the legal periodicals.[7]

The lower courts themselves have addressed this problem. See:

> *Pilot Institute on Sentencing* (Under the auspices of the Judicial Conference of the United States) held July 16 & 17, 1959, reported in 26 F.R.D. 231
>
> *Appellate Review of Sentences* (A symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit). September 24, 1962, reported in 32 F.R.D. 249
>
> *Appellate Review of Sentences* (address of Hon. Les Brewster, Judge, United States District Court, N.D. Tex., before Judicial Conference of the Ninth Circuit, July 15, 1965, reported in 40 F.R.D. 79
>
> *Excerpts From the Proceedings of the Institute on Sentencing for United States Judges of the District of Columbia Circuit*, November 1968, reported in 54 F.R.D. 285

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[6] CRIMINAL SENTENCES: LAW WITHOUT ORDER by U.S. District Judge Marvin E. Frankel (Hill and Wang, 1973).

[7] E.g. *University of San Francisco Law Review*, Fall 1973, p. 214; *Cornell Law Review*, Vol. 59, No. 1, November 1973, p. 177; *Vanderbilt Law Review*, Vol. 26, No. 6, November 1973, p. 1349; *Harvard Law Review*, Vol. 87, No. 3, January 1974, p. 687; *Fordham Urban Law Journal*, Vol. II, No. 1, Fall 1973, p. 169.

Law review articles,[8] cases, proposed statutes, books and statements by federal judges all come back to the basic point:

Undoubtedly, sentencing is one of the most vital and crucial stages of a criminal proceeding. Why should this stage be exempt from any type of appellate review when appellate review is available for practically every other aspect of our judicial system, criminal and civil?

We are not here arguing for absolute uniformity in sentencing. However, we do not deny that the need has become apparent because of widely disproportionate sentences *given throughout* the trial courts. What we do ask is simple:

> "If sentences may be subjected to appellate scrutiny, the compilation of a reviewable record of the sentencing [9] decision would appear to be mandated."

If a trial court must make findings of fact on a disposition of even the most trivial "civil matter," why not as to a sentence he imposes? Why not a finding of why the defendant is not a subject for probation or why the Youth Corrections Act should not apply, or why the defendant is given a longer sentence than co-defendants?

The failure to expressly spell out and answer these questions means that sentencing is without any guidelines whatsoever. There is no doubt that a statute

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[8] Appellate Review of Sentencing: A New Dialogue, University of Colorado Law Review, Vol. 45, 1973, pp. 209-228, Appellate Review of Sentences and the Need For A Reviewable Record, Duke Law Journal, Vol. 1973, pp. 1357-1376.

[9] Appellate Review of Sentences and the Need For A Reviewable Record, op. cit. p. 1358.

without reasonably specifying the prescribed conduct fails for want of due process. Why then should a sentencing procedure not be subject to some of the same objective standards or be wanting in due process?

Charles Fahy, Senior Judge, U. S. Court of Appeals (District Col.) in reviewing Judge Frankel's book, LAW WITHOUT ORDER, in the Cornell Law Review [10] states:

> Sentences, like the exercise of discretion elsewhere should be reviewable to determine the proper application of relevant factors prescribed by law and for abuse of discretion . . . I have long been convinced of the need for review of sentences, although not so thoroughly convinced it should be by courts of appeals rather than by some other body composed for the purpose. I do believe however, the most feasible step toward review to be by the courts of appeals. (pp. 178, 179)

A final comment on *Furman v. Georgia* seems appropriate even though there does not seem to be any single reason for the majority's opinion. Justices Brennan and Marshall both quote with approval this portion of Justice Field's dissert in *O'Neil v. Vermont* (144 U. S. 323 at 339-340)

". . . [The Clause] is directed . . . against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive . . ."

Justice Brennan cites *Weems v. U. S.*, 349 approvingly, a case which reversed a too severe sentence.

Justice Douglas stated:

"Any law which is nondiscriminatory on its face

[10] Vol. 59, No. 5, November 1973.

may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment." (p. 257)

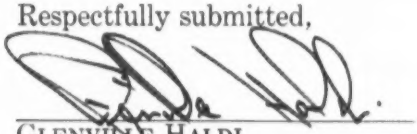
A sentencing law may be applied as discriminatorily in cases involving prison terms as well as cases involving the death penalty. Is the enormity of the death penalty the fact that stirs the Court to review its imposition or is it the fact that it is applied discriminatorily and unconstitutionally?

CONCLUSION

Errors in sentencing are exclusively the work and realm of the judiciary. That excessive and unjust sentences are imposed can hardly be doubted. The monstrous aspect of it is that the judiciary has refused to even review these actions.

We respectfully ask this Court to state that sentences can be reviewed by appellate tribunals.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

I, GLENVILLE HALDI, of counsel for the Appellant, Hazel Mickey Talbert, do certify that this Motion for Reconsideration is presented in good faith and not for the purpose of delay and I further certify that the Motion for Reconsideration is presented in accordance with Rule 58 of this Honorable Court.

This 7th day of June 1974.

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CERTIFICATE OF SERVICE

I certify that I have this date, according to Rule 33 of the Rules of the Supreme Court of the United States, served counsel for the United States of America with three copies of the Motion for Reconsideration herein by depositing same in the United States mail, with adequate first class postage addressed to:

The Solicitor General
Department of Justice
Washington, D. C. 20530

This 7th day of June 1974.

GLENVILLE HALDI
Attorney for Appellant